STATE OF MICHIGAN

COURT OF APPEALS

DONNA E. GREENE,

Plaintiff-Appellant,

v

STATE OF MICHIGAN, LIQUOR CONTROL COMMISSION, and CLIFTON HARDY,

Defendants-Appellees,

and

RANDY MARTIN, ELWOOD WEBB, RONA LEE POLAD and SANDRA RICH,

Defendants.

UNPUBLISHED
December 19, 2000

No. 212566
Eaton Circuit Court
LC No. 96-001268-CZ

Before: Holbrook, Jr., P.J., and Sawyer and Zahra, JJ.

PER CURIAM.

Plaintiff appeals from a judgment of the circuit court for defendants on plaintiff's sexual harassment claims. We affirm.

Plaintiff's claims arise from allegedly being sexually harassed during her employment at the Lincoln Park office of the Michigan Liquor Control Commission from 1992 until 1995. Most, but not all, of plaintiff's allegations center against defendant Clifton Hardy, who was a District Supervisor at the time. Plaintiff was employed as typist. Both plaintiff and Hardy reported directly to Elwood Webb, the Regional Supervisor.

Plaintiff's allegations include various actions by Hardy, including to plaintiff and a female co-worker, Sandra Rich, that they were "attractive" or "sexy", making noises such as "mm-hm-hm" or "oof", staring at plaintiff, particularly in the chest area and downward, and saying, "Just enjoying the view. Can't I enjoy the view?" Plaintiff also alleged that the use of profanity was pervasive throughout the building, particularly the words, "fuck," "bitch," and "slut." In particular, according to plaintiff, women were frequently referred to as "bitches," "sluts" and "cheap sluts."

Various employees of the LCC testified, most as adverse witnesses called by plaintiff. Those witnesses were fairly uniform in denying plaintiff's allegations. They further testified that plaintiff had never complained that such events were occurring in the office. There was, however, extensive testimony that plaintiff did have difficulty getting along with Sandra Rich and she did complain about work-related issues involving Rich, including that favoritism was shown towards Rich over plaintiff, but not of sexual harassment by Hardy or others.

There was some testimony of occasional use of curse words, particularly "shit," "damn," and "hell." Some witnesses testified to hearing or using the word "fuck" on rare occasion and never directed at plaintiff. Other than plaintiff, the witnesses were uniform in denying that any profanity was directed at plaintiff, that she was ever called by sexual names, or that anyone made any sexual advances towards plaintiff.

At the end of trial, the jury returned a verdict in favor of defendants.

Plaintiff first argues that the trial court erred in instructing the jury that the harassment had to be overtly sexual in order for plaintiff to recover. Plaintiff, however, failed to preserve this issue for appeal by objecting to the instruction at trial. *Phinney v Perlmutter*, 222 Mich App 513, 537; 564 NW2d 532 (1997).

Next, plaintiff argues that the trial court erred in refusing to give plaintiff's proposed jury instruction that sex-based comments need not be directed at plaintiff in order to constitute a hostile work environment. It is within the trial court's discretion to give additional jury instructions if they are applicable and accurately state the law and are concise, understandable, conversational, unslanted, and non-argumentative. *Mull v Equitable Life Assurance Society of the United States*, 196 Mich App 411, 422; 493 NW2d 447 (1992). Review of this issue is hampered by the fact that plaintiff's brief does not disclose the exact wording requested by plaintiff, nor does the transcript.[1] Both merely indicate that plaintiff requested an instruction on

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[1] At oral argument, plaintiff's counsel indicated that a copy of the proposed jury instruction had been filed. Specifically, the following exchange took place:

> Q. (By Judge Zahra): Did you file it with the Clerk's Office, your proposed instruction?
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> A. (By plaintiff's counsel): Yes, yes, yes, they were all filed with the Court.

Our review of the record indicates that this is not accurate. No copy of plaintiff's proposed jury instructions can be found in the lower court file nor do the docket entries reflect that a copy was ever filed with the court clerk for inclusion in the file. The record does suggest that plaintiff's counsel may have supplied the trial judge directly with at least some of the proposed instructions. However, handing a document to the trial judge does not ensure that it is included in the record. See *Johnson v Lansing Dairy Co*, 175 Mich App 605, 611, n 12; 438 NW2d 257 (1988) (documents handed to the trial judge but not filed with the trial court are not part of the record before this Court). In short, plaintiff's counsel should either have filed a copy of the requested

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the point that the comments did not have to be directed at plaintiff. The trial court denied the request, indicating that it was satisfied that the instruction defining sexual harassment adequately covered this point.

The trial court's instructions included the following:

> Sexual harassment is a form of discrimination prohibited by State law. Sexual harassment means unwelcomed sexual advances, requests for sexual favors, and other verbal or physical conduct or communication of a sexual nature if:
>
> A) Under all the circumstances a reasonable person would have perceived the conduct or communications as:
>
> 1) Substantially interfering with the plaintiff's employment.
>
> 2) Having the purpose or effect of creating an intimidating, hostile, or offensive employment environment.

We are satisfied that the trial court's instructions were adequate on this point and the trial court did not abuse its discretion in denying an additional instruction on this point. The instruction which was given adequately told the jury that it had to determine if defendants' conduct created "an intimidating, hostile or offensive employment environment." Thus, the jury was instructed to consider their entire conduct, not just conduct specifically directed at plaintiff.

Next, plaintiff argues that the trial court erred in excluding evidence of bias by a defense witness. We disagree. The trial court granted defendants' motion in limine to exclude evidence that a witness, Ronalee Polad, had watched a pornographic movie in a hotel room while attending a work-related seminar with co-workers, including some of the individuals involved in this case. This incident occurred well in advance of the alleged incidents in this case. In fact, it occurred before plaintiff was employed by the Liquor Control Commission. At the time this case arose, Polad was a Deputy Director and was charged with investigating plaintiff's complaints.

The trial court ruled that the evidence was irrelevant. Plaintiff argues that it was relevant to the issue of Polad's bias because it would reflect a camaraderie that Polad shared with some of the individual defendants and, therefore, called into question how independent her investigation was and the accuracy of her conclusion that plaintiff's complaints were without merit.

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instructions with the court clerk or ensured that the trial judge passed his copy along to the clerk for filing in the record. And, in any event, except for those instructions which counsel read in open court and are in the transcript, plaintiff's requested instructions are not in the lower court record.

The decision whether to admit or exclude evidence is in the trial court's sound discretion and will not be disturbed absent an abuse of that discretion. *Wolff v Automobile Club of Michigan*, 194 Mich App 6, 14; 486 NW2d 75 (1992). We are not persuaded that the trial court abused its discretion in handling this issue. First, we note that Polad's determination was not dispositive of this case. That is, at most Polad's conclusions may have influenced the jury, but the jury certainly was not bound to accept those conclusions. Thus, plaintiff was free to explore Polad's potential biases in a number of ways: the fact that she had worked with the various individual defendants for a number of years, that she is now their supervisor, etc. We are not persuaded that the fact she may have watched a pornographic movie on one occasion, several years before, during personal hours while attending a seminar, with some of her co-workers is so indicative of bias that it constituted an abuse of discretion by the trial court in excluding it.

Plaintiff next argues that the trial court improperly questioned a witness. We disagree. It is well established that the trial court may question a witness, so long as the questions are not intimidating, argumentative, prejudicial, unfair or partial. *People v Weathersby*, 204 Mich App 98, 109; 514 NW2d 493 (1994). We have carefully reviewed the trial court's questioning of the witness and are not persuaded that the trial court's conduct in anyway conveyed any impartiality.

Next, plaintiff argues that the trial court erred in excluding evidence that a supervisor, Jim Mahronic, would on frequent occasions, when plaintiff passed by, say in a loud voice, "What's that smell? What's that smell?" This was met by laughter by Mahronic and male co-workers. The trial court granted defendants' motion in limine excluding these statements on the basis that they were not overtly sexual in nature.

The admission or exclusion of evidence is within the trial court's discretion. *Wolff, supra*. We are not persuaded that the trial court abused its discretion in excluding this evidence. First, as the trial court noted, the comments were not overtly sexual; that is, the comment "what's that smell" is not inherently sexual in nature. Plaintiff endeavors to bring the comments within the purview of sexual harassment by stating that she suffered from fibroid vaginal tumors which caused unexpected vaginal bleeding and that Mahronic and the others knew of her condition.

Perhaps plaintiff's medical condition could bring the comments within the scope of *Koester v Novi*, 458 Mich 1; 580 NW2d 835 (1998), if plaintiff pointed to evidence that her medical condition did, in fact, produce a "smell" and that it was plaintiff's female-related medical problems that was the motivating factor for Mahronic's comments. In *Koester* at 10-11, the Supreme Court held that comments about a woman's pregnancy could constitute sexual harassment. Assuming that *Koester* can be extended to the current case,[2] what is missing here is any evidence that Mahronic was motivated by a female-specific medical problem. Plaintiff merely makes the statement that she suffered from this problem and that Mahronic was aware of it. She points to no evidence in the record to establish either of those points. But even if we

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[2] We must be cautious about extending *Koester* too far. The *Koester* opinion did note that, by statutory definition, "sex" includes pregnancy. *Id.* at 10, citing MCL 37.2201(d); MSA 3.548(201)(d).

accept those assertions as true for purposes of considering this issue, she merely speculates that there is a connection between her medical condition and Mahronic's comments.

For these reasons, we cannot conclude that the trial court abused its discretion in excluding the evidence.

We now turn to plaintiff's argument that the trial court erred in admitting a tape recording of a meeting. The recording was of a meeting between plaintiff, Sandra Rich, and their supervisor, Elwood Webb. The purpose of the meeting was apparently to resolve problems between plaintiff and Rich. Plaintiff had recorded the meeting and sent it to a superior, Randy Martin. The defense offered the tape for a variety of purposes: (1) to impeach plaintiff's earlier testimony that she did not use vulgar language at work (the tape reflects that she did, at least on that occasion) and (2) to impeach her testimony that she was intimidated by a supervisor, Cliff Hardy. Defendants suggested that the jury would disagree with that statement when they heard plaintiff"s comments on the tape when Hardy stepped into the room and asked them to hold it down. Also, defendants apparently sought to show that plaintiff, in fact, had no claims of sexual harassment, but was motivated by her personality conflict with Rich.

The basis of plaintiff's objection at trial was the lack of foundation to authenticate the tape. However, on appeal, plaintiff argues that the probative value of the tape is outweighed by its prejudicial effect. Because that was not the basis of the objection in the trial court, appellate review has been waived. *Leavitt v Monaco Coach Corp,* 241 Mich App 288, 296; ___ NW2d ___ (2000).

Next, plaintiff argues that the trial court improperly excluded the opinion testimony of lay witnesses. We disagree. Plaintiff specifically complains that the trial court would not allow plaintiff to inquire of witnesses who held supervisory positions what their knowledge and understanding was regarding sexual harassment. The trial court concluded that the witnesses' opinions on the state of the law was irrelevant and that what was relevant was the definition of sexual harassment that the trial court would provide the jury at the end of the trial. We agree.

What any of the supervisors believed constituted sexual harassment was not relevant to this case. It does not matter how well or how poorly the supervisors understood the definition of sexual harassment. Rather, what matters is whether plaintiff was sexually harassed and whether defendants created or allowed the creation of a sexually hostile work environment. The determination whether such an environment existed is independent of how well the supervisors understood what constitutes sexual harassment. That is, defendants' liability is premised on the existence of a sexually hostile work place, not on the supervisors' abilities to recognize that it exists. Each supervisor could have an extremely accurate understanding of what constitutes sexual harassment, yet a sexually hostile work environment could still have existed. Similarly, the supervisors may have had a poor understanding of sexual harassment, yet the work place was not hostile.

In short, the question for the jury was whether the activity directed at plaintiff in the work place met the legal definition of sexual harassment, not whether it met the witnesses' definition. Accordingly, the trial court did not abuse its discretion in excluding the evidence. *Wolff, supra.*

Next, plaintiff argues that the evidence was against the great weight of the evidence. We disagree. This Court summarized the standard of review for denying a motion for new trial based upon the great weight of the evidence in *Ellsworth v Hotel Corp of America*, 236 Mich App 185, 194; 600 NW2d 129 (1999):

> When a party claims that a jury's verdict was against the great weight of the evidence, we may overturn that verdict "only when it was manifestly against the clear weight of the evidence." *Watkins v Manchester*, 200 Mich App 337, 340; 559 NW2d 81 (1996). This Court will give substantial deference to a trial court's determination that the verdict is not against the great weight of the evidence. *Id*. The trial court cannot substitute its judgment for that of the factfinder, and the jury's verdict should not be set aside if there is competent evidence to support it. *King, supra*, 210. This Court gives deference to the trial court's unique ability to judge the weight and credibility of the testimony and should not substitute its judgment for that of the jury unless the record reveals a miscarriage of justice. *Heshelman v Lombardi*, 183 Mich App 72, 76; 454 NW2d 603 (1990).

We are not persuaded that there is not competent evidence to support the jury's verdict.

Certainly, it is conceivable that the jury could have concluded that plaintiff was sexually harassed if it believed plaintiff's testimony and rejected that of every other witness. While it was in the jury's prerogative to do so, it is not in ours to do so and overrule the jury. The jury apparently found the testimony of the other witnesses more believable than plaintiff's testimony. Plaintiff's suggests that her testimony was corroborated by the testimony of other LCC employees. Plaintiff, however, overstates the matter. At most, the testimony of those other witnesses established that there was occasional use of profanity, though none of it directed at plaintiff. Futher, even the witnesses plaintiff refers to (other than herself) stated such use of profanity was infrequent. We are not prepared to state that the occasional use of profanity compels a jury to conclude that a hostile work environment exists.

Plaintiff also spends time in the issue pointing to alleged inconsistencies in the testimony of various LCC employees. Again, however, it was for the jury, not us, to weigh those alleged inconsistencies and judge what is to be believed.

In sum, while there was evidence from which the jury could have concluded that plaintiff was sexually harassed, the evidence was not so compelling as to lead to the conclusion that the jury's verdict in favor of defendants was against the great weight of the evidence.

Plaintiff next argues that she is entitled to a new trial due to misconduct by defense counsel. Plaintiff alleges improper ex parte communications by defense counsel with the trial judge. However, plaintiff points to no evidence in the record that such conduct occurred. Indeed, the only reference to the record that plaintiff makes in support of her argument is to the trial court's rejection of plaintiff's claim of misconduct in the motion for new trial. The extent of the allegation is that the trial court inquired of defense counsel Long about his father, with whom the trial judge attended law school in the 1970s. The trial court indicated that he had not spoken

to the elder Mr. Long is some fifteen years. And, according to plaintiff's brief, that exchange did not occur during an ex parte communication, but during the conference regarding jury instructions.

In short, plaintiff points to nothing in the record to establish than an improper ex parte communication did occur. And the one item to which plaintiff does document from the record is a very innocuous question by the trial judge during a non-ex parte communication.

Plaintiff's next argument is that the trial court erred in giving defendant's requested instruction on the definition of sexual harassment. Plaintiff complains that that instruction did not include a provision that the offensive remarks or conduct did not have to be directed at plaintiff in order for the jury to conclude that plaintiff was subjected to sexual harassment. However, plaintiff failed to preserve this issue for appeal by making the appropriate objection at trial.[3] *Phinney, supra*.

Next, we turn to a series of arguments by plaintiff that the trial court erred in rejecting a number of requested instructions by plaintiff. As noted above, it is within the trial court's discretion to give additional jury instructions if they are applicable and accurately state the law and are concise, understandable, conversational, unslanted, and non-argumentative. *Mull, supra*.

First, plaintiff argues that the trial court should have given her requested instruction on respondeat superior. Plaintiff's requested instruction would state that respondeat superior "is established if a supervisor has significant input in the process to fire, hire, promote, and discipline." However, even assuming that the trial court erred in refusing this instruction, any error was harmless. The jury answered the first question on the verdict form, whether "plaintiff was subjected to sexual harassment," in the negative. Accordingly, they never reached the question of respondeat superior.

Second, plaintiff argues that the trial court erred in refusing the following instruction requested by plaintiff:

> Victims of discrimination may recover for humiliation, embarrassment, disappointment, and other forms of mental anguish resulting from the discrimination and medical testimony substantiating the claim is not required.

We agree with defendants that, even if the trial court erred in refusing the instruction, any error was harmless. The issue of plaintiff's claim not being supported by medical testimony would go to the amount of damages, not whether plaintiff had been sexually harassed. That is, at most, the lack of medical testimony might have induced the jury to award minimal damages after finding that she had been harassed but suffered little injury as a result. However, as noted above, the jury

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[3] Plaintiff's brief claims that she did, in fact, object. However, the portion of the transcript that plaintiff cites for the objection was not, in fact, an objection to the instruction given. Rather, the "objection" was plaintiff's request for an instruction that the conduct had to be directed at plaintiff. The trial court's rejection of that request was dealt with earlier in this opinion.

rejected the claim that plaintiff was harassed at all. Therefore, it never reached the question of injury and, therefore, the lack of plaintiff's requested instruction did not affect the outcome of this case.

Third, plaintiff argues that the trial court should have given the following requested instruction:

> A plaintiff who makes a hostile environment claim is not required to prove that the work environment seriously affected her psychological well being or led her to suffer injury.

The trial court rejected the request, concluding that the topic was adequately covered by the instructions given. As with the last instruction, we believe that, even if it was error to refuse this instruction, any error was harmless. Like the last instruction, this instruction goes to the issue of damages, not liability. Therefore, its exclusion is harmless inasmuch as the jury never reached the issue of damages.

Fourth, plaintiff argues that the trial court erred in denying its requested instruction that that the sex-based comments need not have been directed at plaintiff. Plaintiff has argued this exact same issue in two previous issues. We see no reason to discuss it further here.

Fifth, plaintiff claims that the trial court erred in refusing to give plaintiff's requested "Special Jury Instruction Number One." We are unable to analyze this issue because we have no idea what Special Jury Instruction Number One said. Plaintiff's brief does not set forth the wording, nor does the portion of the transcript to which plaintiff directs our attention. That portion of the transcript does reflect that plaintiff requested the instruction and describes the instruction in very general terms, but does not actually state the instruction.

Sixth, plaintiff argues that the trial court erred in refusing to give plaintiff's Special Jury Instruction Number Seven. Again, however, plaintiff fails to identify what that instruction said. The transcript reference provided by plaintiff actually identifies plaintiff's request for a Special Jury Instruction Number Two, which defined "respondeat superior," and which was dealt with above. Furthermore, that requested instruction does not define "employer" as meaning a person having one or more employees, which plaintiff's brief identifies Special Jury Instruction Number Seven as having dealt with. In any event, even if we knew exactly what the requested instruction said and agreed that the trial court should have given it, its exclusion is harmless. The proposed instruction apparently dealt with the definition of "employer" and plaintiff claims that it would have given the opportunity to conclude that defendant Hardy was an employer within the meaning of the civil rights act and could alone be liable and not the State of Michigan. However, the jury concluded that plaintiff was not, in fact, sexually harassed. Therefore, the jury would not have needed to reach the question whether defendant Hardy, but not the State of Michigan, was liable.

Plaintiff's final argument is that the trial court erred in rejecting plaintiff's proposed verdict form. According to plaintiff, that form would have given the jury the opportunity to find defendant Hardy liable as an employer within the meaning of the civil rights act. Plaintiff,

however, does not produce the proposed form in her brief nor does she point to where in the transcript we may find her request for a particular verdict form or an objection to the form which was used. Furthermore, as discussed above, even if plaintiff's verdict form should have been utilized, the trial court's failure to do so is harmless. Because the jury concluded that plaintiff was not sexually harassed in the first place, it would never have reached the issue of defendant Hardy's potential liability as an "employer" which is the element of the proposed verdict form that plaintiff argues was missing from the verdict form actually used.

For the above reasons, we conclude that plaintiff is not entitled to a new trial.

Affirmed. Defendants may tax costs.

/s/ Donald E. Holbrook, Jr.
/s/ David H. Sawyer
/s/ Brian K. Zahra